

Program A
ADR: A Dialogue among Judges, Lawyers and Clients

Program Overview

This program provides a forum and a structure for lawyers, clients and judges to talk with one another about issues related to and their concerns about the district's ADR program. Within the same district, judges have divergent views about ADR. If lawyers more fully understand the judges' views about ADR, they will be better equipped to serve their clients' ADR needs and preferences. And judges can benefit from understanding the attorneys' views, and those of their clients, on ADR issues. This dialogue can also inform ADR program leaders about needs and concerns of those affected and served by the ADR program.

Program Objectives

1. For lawyers, judges and clients to exchange views about ADR and the district's ADR program
2. For lawyers to understand the district judges', bankruptcy judges' and magistrate judges' perspectives on, and practice regarding, ADR
3. The district judges', bankruptcy judges' and magistrate judges' major concerns regarding lawyer participation in ADR processes
4. For judges to understand the ADR-related needs and concerns of lawyers and their clients
5. For lawyers and judges to examine how they can more effectively contribute to the effectiveness of the district's ADR program
6. For ADR leaders to understand judges' and lawyers' (and their clients') needs and concerns related to ADR and to get feedback concerning the district's ADR program
7. In districts that are revising the ADR program and/or its local rules, for ADR leaders to develop potential changes in the court's ADR program or in specific local rules

Time for the Program

Activity	Time
Moderator's opening presentation	5 minutes
Panelists' presentations	15 minutes
Dialogue groups	35 minutes
Dialogue group reports	15 minutes
Questions and responses (optional – Allocate time to another activity if it is not used here.)	10 minutes
Concluding remarks by dialogue leaders/panelists	8 minutes
Concluding remarks by moderator	<u>2 minutes</u>
Total time	90 minutes

Program Presenters

1. **Moderator:** The moderator should have experience with court-related ADR issues, perhaps as an administrator or judge who is involved in the administration of the court's ADR program.
2. **Dialogue Leaders/Panelists:** Dialogue leaders fall into two categories: those who serve as panelists for the large group presentations, in addition to leading dialogue groups, and those who lead dialogue groups but are not panelists. The four or five dialogue leader/panelists introduce the program's topic in brief presentations about court-related ADR issues that most concern them. At the end of the program, they also present brief concluding comments.
3. **Dialogue Leaders:** Each table should have a dialogue leader, who begins the conversation, guides it and, if necessary, encourages it by raising issues.
 - The background and experience of the dialogue leaders, especially those who participate in the demonstration, should be varied to mirror the composition of the dialogue groups, which should include the following:
 - Several judges who conduct settlement conferences, preferably District, Magistrate or Bankruptcy judges with strong views about ADR
 - Lawyers with substantial experience representing clients in the district's ADR program processes, both from the private bar and the local U.S. Attorney's office civil division
 - ADR program leaders – one of the following: administrator, judge, lawyer or layperson
 - Program organizers should provide panelists with citations to the reading materials and the written materials that are part of this program module to facilitate their preparation. All dialogue leaders should be involved in the planning process and any rehearsals for the program, whether or not they are part of the initial demonstration.

Room Set-up and Seating: The moderator and dialogue leaders should sit on a dais or stage, in order to be visible to participants. Participants should sit at round tables that seat 6-8. To work most effectively, table seating must be organized to ensure that each table has at least one judge, lawyer, ADR program leader and client (if possible). Organizers can pre-assign table seating and instruct participants where to sit as part of the registration or check-in.

Instructions for the Program: The success of this program depends in large part on the leaders' ability to structure and model the small group dialogues. Leading the dialogues effectively will ensure that any propensity for participants to complain and criticize is redirected to constructive conversation in which problems translate into thoughtful and valuable feedback to all participants, especially to the court, about how ADR programs can be improved and modified to better serve the litigants and lawyers.

1. **Moderator's Opening Presentation (5 minutes):** The moderator welcomes participants, introduces the dialogue leaders, and introduces the program by describing its structure, agenda and objectives. An effective introduction to this program is especially critical to its success. In addition to these introductions, this opening presentation must set a tone and create an atmosphere for learning, by stimulating and encouraging the audience to exchange ideas, attitudes and concerns about ADR. The moderator should also explain how the dialogue group discussions potentially benefit the participants, as well as the court.
2. **Panelists' Presentations (15 minutes):** In 3-5-minute presentations, the panelists each raise one or two ADR-related issues that most interest or concern them that they believe are fundamental to the district's ADR program. They can elaborate on their issues by explaining why the issues are important and relevant to the current situation in the district's ADR program. Panelists might also choose to encourage the participants to give their views on these issues during the dialogue group portion of the program.
3. **Dialogue Groups (30 minutes):**
 - a. ***Set-up for Dialogue Groups:*** The moderator instructs the participants about both the structure and procedures for the dialogue groups, as follows:

Participants prepare for dialogue group exercise by answering questions individually. Project the questions on a PowerPoint screen; write them on poster paper; or duplicate and distribute them to the audience. The moderator asks the participants to think about their response to these questions and make notes to use in the dialogue groups.

- **Judges** – What are the attitudes/philosophies/theoretical underpinnings that inform my approach to court-connected ADR?
- **Lawyers** – What are my needs and concerns related to ADR and the district's ADR program? What are my clients' needs and concerns? What does the district's ADR program do effectively? How could it become more effective?
- **ADR program leaders** – What could judges and lawyers do to make the ADR program more effective?

Participants meet in dialogue groups

- 5-6 persons per group
- Ideally, include in each group a judge, lawyer or person connected with the ADR program (program leaders, administrators, etc.)
- Select a scribe, who will take notes and report back the most important points raised in the dialogue group

- b. ***Small Group Discussion:*** Dialogue group leaders begin the discussion, guide it if the participants stray from the structure and, if necessary, encourage it by raising relevant issues. Participants discuss the questions raised above in the individual preparation. They treat the discussion as a dialogue, raising questions among themselves as they arise in the discussion.
4. **Dialogue Group Reports and Discussion (10 minutes):** If the discussion leader/panelists have served as discussion leaders, they return to the dais. The moderator leads the reports by calling on the scribes for each group. Scribes stand at their tables and report the main points. If there are only a few tables, the moderator may choose to write the suggestions on a whiteboard or an easel pad. For programs with more than four tables, the moderator may ask the scribes to submit their respective lists, so that the program organizers will have the option of collecting the information for future use.
5. **Questions and Responses (optional) (10 minutes):** Following the reports, the moderator and or panelist/dialogue leaders may wish to facilitate a question-response period in the large group to allow participants to direct questions to particular groups or to individuals who raised specific concerns. Because the entire program is interactive, this part of the program is optional. If program organizers do not include the question and responses segment, they may allocate time to other activities.
6. **Concluding Remarks by Dialogue Leaders (8 minutes):** Dialogue leader(s) conclude the session in a manner that does justice to the session, including any or all of the following:
 - Briefly (1-2 minutes) summarizing the session and thanking the other dialogue leaders and the audience for their participation
 - Encouraging the audience to incorporate concepts they have learned and consider modifying their approaches to ADR based on the input they receive
 - Encouraging the audience to continue to engage in learning conversations with one another about ADR and other subjects that matter to them as lawyers, judges and administrators
7. **Concluding Remarks by Moderator (2 minutes):** The moderator thanks the panelists, dialogue leaders, and participants. If the organizers plan any follow-up, the moderator announces these plans.

Written Materials

1. Instructions for Panelists and Dialogue Leaders
2. Concerns of Judges, Lawyers and Clients about Court ADR Programs

Possible Follow-up: To make the most of this program, the moderator could request that the scribes hand in their respective lists. A volunteer could assemble the lists and the suggestions from the panelists and create a composite list of suggestions for distribution

to district conference participants, and/or a volunteer could write a newsletter or local bar magazine article summarizing the suggestions. Either of these approaches would increase the likelihood that program participants retain and apply concepts they learn. Alternatively, a volunteer could turn the suggestions into a document to be sent to all judges and lawyers along with the notice setting a settlement conference, and/or the court could post the information on its website.

Resources

Publications

1. Brazil, Wayne D., "Court ADR 25 Years after Pound: Have We Found a Better Way?" 18 Ohio St. J. on Disp. Resol. 93 (2002).
2. Brazil, Wayne D., "Should Court-Sponsored ADR Survive?" 21 Ohio St. J. on Disp. Resol. __ (forthcoming in early 2006).
3. Nelson, Dorothy W., "ADR in the Federal Courts – One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators and the Public," 17 Ohio St. J. on Disp. Resol. 1 (2001).
4. Nelson, Dorothy W., "Which Way to True Justice? – Appropriate Dispute Resolution (ADR) and Adversarial Legalism," 83 Univ. of Neb. L. Rev. 167 (2004).
5. Niemic, Robert J., Stienstra, Donna, and Ravitz, Randall, *Guide to Judicial Management of Cases in ADR* (Federal Judicial Center 2001).¹
6. Plapinger, Elizabeth, and Shaw, Margaret, "Court ADR: Elements of Program Design (CPR Legal Program 1992).
7. Sanders, Frank E.A., ed., *Emerging ADR Issues in State and Federal Courts* (ABA Section of Litigation 1991.)

Cross-reference: Please refer to the program module entitled "What Settlement Judges Want Lawyers to Know and What Lawyers Want Settlement Judges to Know" for additional ideas or articles related to this program.

¹ The Federal Judicial Center website (<http://www.fjc.gov>) provides this document and many other ADR related publications.

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Instructions for Panelists and Dialogue Leaders

Role of Dialogue Leaders/Panelists: Dialogue leaders fall into two categories: four or five individuals serve as panelists for the large group presentations, in addition to leading dialogue groups (dialogue leaders/panelists), and those who lead dialogue groups but are not panelists (dialogue leaders).

Tasks for the Dialogue Leaders/Panelists in Introducing the Program

1. Introduce the program's topic in brief presentations about court-related ADR issues that most concern them. At the end of the program, they also present brief concluding comments.
2. Coordinate their presentations with the program organizers and use the written materials included at the end of this program module, to prepare ("Possible Concerns of Judges, Lawyers and Clients about Court ADR Programs.")

Tasks for Dialogue Leaders in Setting up the Dialogue Groups

1. **Instruct the group to select a scribe** who will take notes and report back to the large group the small group's advice.
2. **See that group members have responded to questions raised by the moderator.** Prior to beginning the dialogue groups, the moderator will instruct all the participants to prepare for the dialogue group exercise by answering questions individually. The moderator will project the questions on a PowerPoint screen, write them on poster paper or duplicate and distribute them to the audience. The moderator will ask the participants to think about their response to these questions and make notes to use in the dialogue groups. Dialogue leaders should also make notes on their responses to the questions. The questions are:
 - **Judges** – What are the attitudes/philosophies/theoretical underpinnings that inform my approach to court-connected ADR?
 - **Lawyers** – What are my needs and concerns related to ADR and the district's ADR program? What are my clients' needs and concerns? What does the district's ADR program do effectively? How could it become more effective?
 - **ADR program leaders** – What could judges and lawyers do to make the ADR program more effective?

Tasks for Dialogue Leaders in Facilitating the Discussions

1. **Get the discussion going:** Ask a couple of the participants at your table to give their individual responses to these questions. Then begin to discuss these questions. Treat the discussion as a dialogue, raising questions as they arise in the discussion.

2. **Guide the discussion:** Facilitate a conversation and encourage everyone in your group to participate actively. Do not let a few people dominate the discussion; make certain to invite others to speak.
 - Encourage the judges to use this opportunity to give advice to lawyers about their perspective on the district's ADR program. Encourage lawyers and other participants to give advice to judges from their experience, as well as concepts they have learned from others. Encourage the court staff to offer insights from anecdotal complaints or stories they have heard.
 - If the discussion lags, use the written materials that are included at the end of this program module – “Possible Concerns of Judges, Lawyers and Clients about Court ADR Programs” – to prompt the dialogue.

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Concerns Judges, Lawyers and Clients Might Have about Court ADR Programs

Concerns Judges Might Have about Court ADR Programs

1. Will the ADR program interfere with or unfairly burden the litigants' access to trial?
2. Does the program implicitly denigrate the jury trial?
3. Does the program result in higher settlement rates, thus reducing judges' opportunities to preside at trials, to perform core judicial functions and, by hearing significant cases, to play a major role in matters of consequence to the community? Should this matter?
4. Does the program impose net cost and personnel costs on the court, diverting limited court resources from core judicial functions, or does it result in net savings of court resources?
5. Are court ADR programs changing the nature of judicial institutions – converting them from houses of publicly adjudicated justice to smorgasbords of services, some of which are designed to be as different from traditional adjudication as possible?
6. Can the court maintain an appropriate level of quality control over the ADR services its neutrals provide – so that the program is not perceived as constituting a second-class system of justice but, instead, enhances public respect for, and gratitude toward, the court?
7. Will the institutionalization of ADR discourage lawyers from taking earlier initiative to try to settle their cases? Does it encourage lawyers simply to wait for the ADR event – even when they may not need ADR to settle the case?
8. By providing only one or two kinds of ADR, will the court's program discourage innovation and flexibility? Will it discourage lawyers and parties from thinking carefully about what kind of process would best fit the specific needs of their case?
9. Will counsel and clients appreciate the many different ways they can benefit from ADR and try to take full advantage of its potential, or will they underestimate its potential and underutilize it?
10. Will participation in the ADR event become perfunctory, becoming just another ritual that makes no meaningful contribution to disposition?
11. Will the court and/or parties be able to identify accurately the cases that are appropriate for ADR?
12. Will the court and/or parties be adept at matching cases with the particular kind of ADR (mediation – both facilitative and evaluative, early neutral evaluation, non-binding arbitration, mini-trial, summary jury trial, med-arb, etc.) that is most promising for the particular case?

Concerns Lawyers and Clients Might Have about ADR Programs

1. Will the court ADR program impose additional unproductive cost barriers to getting to trial?
2. Will the range and character of the benefits that participation in the ADR program delivers to parties and their lawyers justify the burdens that participation entails?
3. Will referral to the ADR program delay access to case management from the judges, delay hearings on motions or delay access to trial?
4. Will the court force cases into an ADR track or event even when the referral is not likely to be productive or when litigants who are well informed about ADR do not choose to use it?
5. Will the court be open to suggestions from counsel and clients about which ADR process best suits their particular case, or will the court force all parties into a one-size-fits-all ADR proceeding?
6. Will the neutrals in the court's program put too much pressure, or not enough pressure, on parties to settle?
7. Will the neutrals be competent, in process tools and subject matter expertise, and will they play appropriate roles? Or will their interventions and opinions make settlement more difficult to achieve?
8. Will the neutrals invade the relationship between attorney and client, *e.g.*,
 - By suggesting that the lawyer's analysis or advice is not reliable,
 - By pressuring the client to follow a course the lawyer thinks is unwise, or
 - By emphasizing how much the client will be required to pay the lawyer over the course of the litigation and suggesting that expense is not justified?
9. Will other lawyers or parties not participate in good faith in the ADR process, but, instead
 - Use it to increase costs for others,
 - Use it as a cheap vehicle for discovery, or
 - Use it as a means to gain access to counsel's work product or trial strategy?
10. Will the existence of the court's ADR program make it more difficult to secure a settlement conference hosted by a magistrate judge, a bankruptcy judge or a district judge? Will the court use its ADR program as an excuse for not providing judicially hosted settlement conferences?
11. Will the ADR neutrals communicate, surreptitiously or otherwise, with the judge who is assigned to the case?
12. Will the neutrals disclose confidential mediation communications to the assigned judge, or report back to the assigned judge any parties who failed – in the neutral's view – to participate in “good faith,” had the weaker positions or prevented a reasonable settlement from being achieved?
13. Will the court punish parties for not settling their case through the ADR program, *e.g.*, by pushing their case back in the trial queue or responding slowly to motions or other pretrial needs?

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Feedback Form

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: _____

Tel. no.: _____ E-mail address: _____

Location of the program: _____

1. How did you use the module? If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

2. How can we improve the module?
3. How can we improve the Program Guide?
4. What additional questions might we include to stimulate discussion in the dialogue groups?
5. What additional concerns did the participants raise about the district's ADR program?
6. Please provide suggestions for future ADR program modules.